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IN THE

Supreme Court of the United States

October Term, 1967

No. 1161

VALLECITO WATER COMPANY,
Petitioner,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

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WESTERN PRINTING COMPANY, WHITTIER—OXBOW 8-1722

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PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

Petitioner prays that a writ of certiorari issue to review the judgment of the California Supreme Court entered in the above-entitled case on December 13, 1967.

CITATIONS TO OPINIONS BELOW

The memorandum order of the California Supreme Court denying the petition for a writ of review is unreported and is printed in Appendix A hereto, *infra.* The Interim Opinion of the Public Utilities Commission is printed in Appendix B hereto, *infra.*

JURISDICTION

The Interim Opinion of the Public Utilities Commission was entered on December 30, 1966. A timely petition for rehearing was filed, and the petition for rehearing was denied on May 2, 1967. A timely Petition for Writ of Review was filed in the California Supreme Court, and was denied by that court on December 13, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3). The federal question sought to be presented here was raised at the first available instance before the Public Utilities Commission Petition for Rehearing, at p. 2, and before the California Supreme Court (Petition for Writ of Review and Points and Authorities in Support Thereof, at pp. 25-29).

QUESTION PRESENTED

Whether a state regulatory agency may, consistent with the requirements of due process of law, order a public utility to cancel approximately $300,000 worth of stock issued to one of its shareholders where that order rests on conclusion of adjudicatory fact and law made in a hearing to which the shareholder was not a party.

STATUTES INVOLVED

Calif. Pub. Util. Code § 852:

"No public utility shall purchase or acquire, take or hold, any part of the capital stock of any other public utility, organized or existing under or by virtue of the laws of this State, without having been first authorized to do so by the Commission. Every assignment, transfer, contract, or agreement for assignment or transfer of any stock by or through any person or corporation to any corporation or otherwise in violation of any of the provisions of this article is void and of no effect, and no such transfer shall be made on the books of any public utility."

Calif. Pub. Util. Code § 1759:

"No court of this State, except the Supreme Court to the extent specified in this article, shall have jurisdiction to review, reverse, correct, or anunal any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the commission in the performance of its official duties, except that the writ of mandamus shall lie from the Supreme Court to the commission in all proper cases."

Calif. Corp. Code § 2470(b)(1):

"(b) The right to rescind the transfer of a certificate and reclaim the possession thereof does not exist in either of the following cases:

(1) If the certificate has been transferred to a purhaser for value, in good faith, without notice of any facts making the transfer wrongful."

STATEMENT

This petition seeks review of an order of the California Public Utilities Commission requiring Petitioner, a regulated public utility, to cancel 18,003 of its shares held by one William J. Hickey which he had purchased for approximately $300,000. Petitioner claims that this order is violative of the Due Process Clause of the Fourteenth Amendment in the most fundamental sense: the order commands the taking of Mr. Hickey's property without any hearing whatsoever, for he was not a party to the proceedings out of which the order compelling the cancellation resulted.

Petitioner is a public utility engaged in furnishing water service in Southern California. In 1963, two water companies vied for the right to acquire Petitioner's assets, either through the purchase of all of its stock or directly through the purchase of its assets. These companies—San Gabriel Water Company and Suburban Water Systems—applied for Commission approval of their proposed acquisitions. This approval was necessary as Section 852 of the Public Utilities Code forbids a public utility from acquiring the stock of another except with the consent of the Commission. Section 852 provides:

> "No public utility shall purchase or acquire, take or hold, any part of the capital stock of any other public utility, organized or existing under or by virtue of the laws of this State, without having been first authorized to do so by the commission. Every assignment, transfer, contract, or agreement for assignment or transfer of any stock by or through any person or corporation to any corporation or otherwise in violation of any of the provisions of this article is void and of no effect, and no such transfer shall be made on the books of any public utility."

During this period, a number of shares of Petitioner's stock were acquired by Calfin Co., a wholly-owned subsidiary of Suburban. The Commission found that Calfin was the alter ego of Suburban and, thus, that the securities were purchased by Calfin in violation of Section 852 of the Public Utilities Code of California. Decision No. 67261 (62 Calif. P.U.C. 699 (1964)).

Shortly thereafter, Suburban filed an application to acquire the stock in Petitioner which had been purchased by Calfin in violation of Section 852 and therefore "void." Before the Commission had acted on this application, on November 4, 1964, 18,003 shares of Petitioner's stock were sold by Calfin to one William J. Hickey.

The Commission thereupon, on December 15, 1964, commenced proceedings for the purpose of exploring *inter alia* the acquisition by Mr. Hickey of stock in Pe-

titioner from Calfin. (A copy of this Order Instituting Investigation is attached hereto as Appendix C). Hickey's position has been and remains that he was a bona fide purchaser, unaware of these various Commission proceedings and the contention that the stock held by Calfin and sold to him was "void." He maintains that under California law he is, as a bona fide purchaser, protected by application of Section 2470(b)(1) of the California Corporations Code, which at the time of the transfer provided:

> "(b) The right to rescind the transfer of a certificate and reclaim the possession thereof does not exist in either of the folowing cases:
>
> (1) If the certificate has been transferred to a purhaser for value, in good faith, without notice of any facts making the transfer wrongful."

The Commission held hearings and finally concluded that Hickey was not a bona fide purchaser; accordingly, it ordered Petitioner to cancel the stock now held by Mr. Hickey. It is this order of which Petitioner now complains because, as is hereafter shown, Mr. Hickey *was not a party to the Commission's proceedings.* The following narrative shows the course of the proceedings before the Commission and demonstrates clearly that Mr. Hickey was not before the Commission when it concluded that his stock must be cancelled.

The Commission's Order Instituting Investigation (Appendix C) named as parties respondent several water companies, two banks, and several individuals, one of whom was Mr. Hickey. At this point, it appeared that the Commission intended to make Mr. Hickey a party. However, Hickey (as well as other individuals who had been named as respondents by the Commission's Order of December 15, 1964) appeared by counsel before the Commission on August 31, 1965* at which time various objections to the investigation were interposed. One of the points raised by counsel for Mr. Hickey as well as the counsel for other individuals was that the Commission's jurisdiction did not, as a matter of California law, extend to private individuals but was limited to public utilities.* The merits of that legal position are no longer in issue in this case as the Commis-

*Hickey had previously appeared on July 29, 1965, in compliance with the Commission's subpoena but was without counsel. He requested an opportunity to obtain counsel and the matter was continued to August 31, 1965.

*Their position was that because the Commission could not exercise jurisdiction over individuals such as Hickey, the appropriate forum for the resolution of the question as to the legitimacy of Mr. Hickey's stock rights was the Superior Court (a court of general jurisdiction in California). Counsel for Mr. Hickey advised the Commission at the hearing on August 31, 1965 that to the end that this question might be adjudicated in a forum capable of exercising jurisdiction over all the parties, an action had been filed in the Superior Court in and for the County of San Francisco. *Hickey v. Vallecito Water Co.*, No. 558551. The complaint sought to quiet Mr. Hickey's title to the stock. The Commission sought to have the proceeding restrained through a perogative writ proceeding in the California Supreme Court (*Public Utilities Commission v. Superior Court*, S.F. No. 22194) but the petition was denied on January 12, 1966. The Commission thereupon intervened in the Superior Court proceeding and sought injunctive relief against Mr. Hickey. Upon the denial of a perliminary injunction and the denial of the Commission's motion for a stay pending the proceedings pending before the Commission, a second perogative writ proceeding was undertaken in the California Supreme Court. (S.F. No. 22341). Again the Commission's petition was denied. The Superior Court action was subsequently stayed by the court pending the outcome of the proceedings before the Commission and has not yet gone forward.

sion chose not to adhere to the initial decision to designate Mr. Hickey and the others as parties respondent. Instead, the Hearing Examiner and the Senior Counsel for the Commission announced that Mr. Hickey was not a party to the proceedings; that the caption on the Order Instituting Investigation designating him as such was in error and should be disregarded; and that he was before the Commission solely as a witness:

(i) The Commission's Senior Counsel, Mr. Saroyan, stated:

> "It is true that Mr. Schumacher's name is in this Order Instituting Investigation as a respondent . . . along with other . . . nonutility people, two banks and Mr. Hickey. . . .
>
> "Now, as I say, the Order . . . is very broad but I will lay this matter to rest right here and now that the staff does not intend to assert any jurisdiction or attempt for the Commission to exert any jurisdiction over Mr. Schumacher.
>
> "MR. DOWNS [counsel for Hickey]: Mr. Saroyan, as I understand it, your statements as to Mr. Schumacher are also applicable to Mr. Hickey?
>
> "MR. SAROYAN: Yes, and it has been said two or three times at the last two days of hearings, a month ago, Mr. Downs." (R.T. Vol. 3, pp. 268-272, Hearing of August 31, 1965).

(ii) Previously, Mr. Saroyan had stated of Hickey:

"Mr. Examiner, this gentleman has been subpoenaed to appear as a witness *and nothing but a witness.*" (R.T. Vol. 2, pp. 239, 240, Hearing of July 29, 1965, emphasis added).

(iii) Subsequently, the Hearing Examiner had occasion to emphasize this point in response to the attorney for Mr. Schumacher who, like Mr. Hickey, had originally been named as a respondent:

"EXAMINER WARNER: But you weren't here at the original hearing and Mr. Hickey took the same position (*i.e.,* that the Public Utilities Commission lacked jurisdiction over him) and it was clear on the record that the Commission did not make him a respondent.

* * *

"He was subpoenaed as a citizen, a material witness, an alleged material witness, by the Commission the same as any other person. But he disclaimed any jurisdiction by the Commission and the Commission asserted none." (R.T. Vol. 3, p. 267, Hearing of August 31, 1965).

In reliance upon these, and upon similar statements (*e.g.,* R.T. Vol. 3, at pp. 294, 296, 303), Mr. Hickey did not find it necessary to press his claim that the Commission lacked jurisdiction over him. Advised that he was not a party, he did not participate in the proceedings, did not introduce evidence, and did not examine any witnesses.

The Commission entered its Interim Opinion on December 30, 1966 (Appendix B), in which it reiterated its previous finding that the shares purchased by Calfin were acquired and held in violation of section 852 because no Commission consent had been obtained. It further found that "Hickey did not acquire said shares in good faith" (Appendix B at p. 15 of the typed opinion and, thus, that the "issuance and transfer by Vallecito of its Stock Certificate No. 1024 to Hickey was null and void and of no effect" (*id.*, at p. 16 of the typed opinion). Its interim order was that Vallecito

> " . . . shall, within 10 days after the effective date hereof, reverse its stock transfer records and cancel the transfer to William J. Hickey of Stock Certificate No. 1024, covering 18,0003 shares of Vallecito's common stock." (*Id.*, at pp. 16-17 of typed opinion)

A timely petition for rehearing was filed on January 6, 1967 by Petitioner, objecting, *inter alia* to the Commission's purported exercise of jurisdiction with respect to the stock of Mr. Hickey. This was denied by the Commission on May 2, 1967. Petitioner thereupon filed, on June 1, 1967, a timely Petition for Writ of Review in the California Supreme Court, the only California tribunal with jurisdiction to review orders of the Public Utilities Commission. On December 13, 1967, the California Supreme Court denied the Petition.

REASONS FOR GRANTING THE WRIT

Petitioner has been ordered to cancel shares of stock purchased by Mr. Hickey at a cost of approximately $300,000. Mr. Hickey was not a party to the proceedings and had no reason or opportunity to exercise the rights of a party to introduce evidence and examine witnesses. The effect of the Commission's Order is to divest him of $300,000 worth of stock on the basis of facts found and legal conclusions drawn in a proceeding to which he was not a party and at which he was advised at the outset by the Commission that he was called solely as a witness and not as a party. This is an egregious violation of the right to a hearing which is the essence of the requirement that neither life, liberty or property shall be taken without due process of law.

1. A hearing at which Mr. Hickey would have been permitted to participate as a party would have been no mere formality. At issue was the critical question, on which Mr. Hickey's rights turn, of whether he was a bona fide purchaser of the stock who, therefore, would have been protected against the defects in the title caused by the allegedly illegal manner in which Calfin (the seller) had previously acquired stock.* We do not

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*In the California Supreme Court, the Commission argued that even if Hickey were a bona fide purchaser, he would not be protected by section 2470(b)(1) of the Corporations Code (quoted at p. 3, *supra*). We think that point is insubstantial as a matter of state law; for present purposes, it is sufficient to note that (a) there are no California authorities on the point; (b) Hickey's interpretation of §2470 has never been rejected in any proceeding to which he was a party; and (c) in fact, the Commission's order assumed that *were he a bona fide purchaser, he would be protected* and found as a fact that he was not a bona fide purchaser. It is that finding, made in a proceeding to which Hickey was not a party, that is in issue here.

propose to review the facts on which the Commission's Order was based or to indicate the evidence which Hickey could have introduced, had he been given the opportunity, to establish that he was a bona fide purchaser. It is enough to say that the facts are hotly disputed; yet Petitioner has been ordered to cancel Hickey's stock, for which he paid $300,000, on account of this order made in a proceeding to which Hickey was not a party.

2. Where "adjudicative facts" (Davis, Administrative Law Treatise [hereafter cited as "Davis"], § 7.02 (1958)) are in dispute, neither a court nor an administrative agency may act with respect to the interests of a person without affording him an opportunity to be heard. But as Professor Davis has observed, "Judicial opinions have not crystallized any basic principle to guide the determination of when the method of trial should be required, either by due process, or by interpretation of a statutory requirement of 'hearing' . . . ." (Id., at § 702). This case presents an excellent opportunity for this Court to clarify several important principles with respect to the most fundamental of rights enshrined in the Due Process Clause of the Fourteenth Amendment: the right to be heard.

(a) This Court has said time and again that due process requires that a hearing be afforded where an individual's property rights are subject to regulation or taking on the basis of judgments or determinations which are not general—that is, in Professor Davis'

terms, determinations of "adjudicative fact." "A hearing," this Court long ago said, "in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument, however brief, and, if need be, by proof, however informal." *Londoner v. Denver,* 210 U.S. 373, 386 (1908). The nature and extent of the hearing which must be afforded is not at issue in this case, for no hearing of any kind was afforded Mr. Hickey; the sole question is whether some kind of hearing must be given before action of the character ordered here may be taken. Where property is to be taken by order of the government, adjudicative facts must be resolved by a hearing to which the owner of the property is party. *E.g., Bragg v. Weaver,* 251 U.S. 57 (1919). That principle is not easily challenged, and a justification for the denial of that right to a hearing is difficult to perceive. Yet the taking of property without hearing was ordered in this case, in a disregard of the right to be heard, which suggests that a reaffirmation of this principle by this Court is urgently needed.

(b) The Commission suggested in the court below that it was improper for Petitioner to complain of the denial of due process which would result to Hickey if his stock were cancelled without an opportunity to be heard. We view this as an erroneous conception of the principles of "standing" which, in appropriate circumstances, preclude one party from asserting the rights of another. Here application of that principle is wholly inappropriate. Petitioner has been ordered by

the Commission to cancel the stock of Mr. Hickey; if, as we maintain, the order is unlawful in that Hickey never was given an opportunity to be heard, compliance by Petitioner with this order may subject it to civil liability.* As the California Supreme Court itself has recognized (see *Parish v. Civil Service Commission,* 66 Adv. Cal. 253, 258 (1967)), one compelled by the State to commit an unconstitutional act has standing to protest so that he will not be the unwilling instrument for the violation of the constitutional right of others. Moreover, the principle of "standing by necessity" is probably applicable here; as a technical matter, there may be no other means by which the rights of Mr. Hickey can be adjudicated. He was not a party to the proceedings before the Commission and apparently could not have sought review of the Commission's order in the California Supreme Court (or thereafter in this Court). The Commission continues to assert that, as a matter of California law, he will not be able to obtain relief in the courts of California to prevent the cancellation of his stock.* Where there is no other person who

*And, indeed, counsel for Mr. Hickey has advised Petitioner that an action for damages is contemplated in the event Hickey's stock is cancelled by Petitioner.

*The Commission takes the position that Section 1759 of the California Public Utilities Code forbids the Superior Courts from in any way interfering with the execution of its orders. That section provides:

> "No court of this State, except the Supreme Court to the extent specified in this article, shall have jurisdiction to review, reverse, correct, or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interefere with the commission in the performance of its official duties, except that the writ of mandamus shall lie from the Supreme Court to the commission in all proper cases."

can assert the constitutional rights which have been violated, the customary requirements as to standing are relaxed to permit another person affected by the order to raise those questions. *Barrows v. Jackson,* 346, U.S. 249 (1953).

(c) But the question of standing may, in fact, be simply another way of phrasing the question of whether an order entered by an administrative body in a proceeding to which a person whose property will be taken or cancelled was not a party is valid. Putting the matter another way, to what extent does the principle of "indispensible parties" extend to administrative hearings? That question has never been satisfactorily resolved by this Court, and in fact remains unclear in the wake of several decisions of this Court which are difficult to reconcile.

In *N.L.R.B. v. Pennsylvania Greyhound Lines,* 303 U.S. 261 (1938), this Court upheld an order directing a company to withdraw recognition of a union found to be company-dominated in a proceeding to which the union was not a party. Sweeping language (see, e.g., 303 U.S., at 271) suggested that the test was whether the terms of the order ran against the union which was not made a party. But a decision rendered not long after confined the holding in the *Greyhound* case. In *Consolidated Edison Co. v. N.L.R.B,* 305 U.S. 197 (1938), the Court distinguished the *Greyhound* case on the ground that the union in *Consolidated Edison* was

not a company union, holding: "We think that the Brotherhood and its locals having valuable and beneficial interests in the contracts were entitled to notice and hearing before they could be set aside." (305 U.S., at 233). See also *N.L.R.B. v. Cowell Portland Cement Co.*, 108 F.2d 198 (9th Cir. 1939).

Subsequently, the decisions of this Court in *National Licorice Co. v. N.L.R.B.*, 309 U.S. 350 (1940) and in *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146 (1941) indicated that in at least some circumstances, notice to the union need not be given. The issue in this precise factual setting may not again be presented because the National Labor Relations Board's present practice is to include as a party "any person named . . . as party to a contract in any proceeding under the act. and any labor organization alleged to be dominated, assisted, or supported in violation of section 8(a)(1) or 8(a)(2) of the act . . . ." NLRB Rules and Regulations, 29 C.F.R. § 102.8. But the constitutional issue remains very much unresolved in this and other settings.

An example concerns the rights of parties affected by awards and determinations of the National Railroad Adjustment Boards. A number of cases have considered the question of whether, where the interests of two employees are opposed to each other, they are all entitled to be heard. The Courts of Appeals have frequently held that a hearing must be afforded to all persons materially affected by the adjudication and

that orders made in proceedings in which one or more persons having such an interest were not given notice is void. *See, e.g., Nord v. Griffin,* 86 F.2d 481 (7th Cir. 1936), *cert. denied,* 300 U.S. 673 (1937); *Estes v. Union Terminal Co.,* 89 F.2d 768 (5th Cir. 1937); *Hunter v. A.T. & S.F. R. Co.,* 171 F.2d 594 (7th Cir. 1948), *cert. denied,* 337 U.S. 916 (1949); *Hunter v. A.T. & S.F. R. Co.,* 188 F.2d 294 (7th Cir.), *cert. denied,* 342 U.S. 819 (1951); *Allain v. Tummon* 212 F.2d 32 (7th Cir. 1954). The question then came to this Court in 1955 in *Whitehouse v. Illinois Central R. Co.,* 349 U.S. 366 (1955) but was not resolved in that case; as Professor Davis has observed, "The Court not only refused to settle the law but seemingly went out of its way to unsettle it." (Davis, at §8.11). The Court said in *Whitehouse*:

> "This [the notice and hearing question] remains a perplexing problem despite the substantial agreement among Courts of Appeals which have considered the question in holding that notice is required to other persons in varying situations . . . . In the context of other related provisions it is certainly not obvious that in a situation like that now before us notice need be given beyond the parties to the submission." (349 U.S., at 370).

Subsequent decisions of the Courts of Appeals have generally indicated that a decision made without notice to those who will be materially affected by it is not

enforceable (*e.g., Order of Railroad Telegraphers v. New Orleans, Tex. & M. Ry. Co.,* 229 F.2d 59 (8th Cir.) *cert. denied,* 350 U.S. 997 (1956)), but the issue is by no means resolved The present case offers an excellent opportunity for consideration of the point in a setting less encumbered by the statutory complexities inherent in the labor or railroad fields. Review should be granted to consider whether the right to a hearing in a matter involving the taking or cancellation of property rests on the technicality of whether the order specifically mentions the persons whose property is being taken.

3. The Commission has not as yet advanced any plausible justification for its assertion of the right to deprive Mr. Hickey of his stock without any hearing whatever. In the California Supreme Court, the Commission argued that the designation of Mr. Hickey as a respondent in the initial Order Instituting Investigation was "all the notice and opportunity to be heard required by due process of law." Moreover, the Commission suggested that there could be no complaint as Hickey was not *prevented* from attending the hearings. This entirely misses the point; Mr. Hickey objected to the Commission's initial attempt to exercise jurisdiction over him, being of the view that the Superior Court was the appropriate forum for restitution of these matters. The Commission made an about-face and announced that it was *not* exercising jurisdiction over Mr. Hickey; that he was called solely as a witness; and that its initial designation of him as a respondent was

erroneous and to be disregarded. That Hickey did not thereafter participate is hardly significant; the Commission is forbidden—as is any agency of the State—from luring one into a waiver of a fundamental Constitutional right. See *Raley v. Ohio,* 360 U.S. 423 (1959); *Stevens v. Marks,* 383 U.S. 234 (1966).*

CONCLUSION

Petitioner has been ordered to deprive Mr. Hickey of his stock worth approximately $300,000 following a hearing to which Mr. Hickey was not a party. A more flagrant denial of due process of law is difficult to conceive. In the complexities of the administrative process, the most basic of rights—the right to be heard—appears to have been utterly overlooked. Review is needed to declare anew that action adverse to the interests of an individual based, as was the case here, upon findings of adjudicative fact, cannot be had without an opportunity for a hearing. That opportunity was denied here, and only this Court can set matters right.

Respectfully submitted,

HERBERT A. BERNHARD
Attorney for Petitioner.

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*Hickey was not being coy in refusing to intervene voluntarily; that was consistent with his assertion that the Superior Court—not the Commission—was the appropriate forum for resolution of the question of his title to the stock. See note p. 7, *supra.* And the due process violation is not cured by the *possibility* that Hickey could have voluntarily intervened; if he was entitled to a hearing, the burden was on the Commission to make him a party. *Whitehouse v. Illinois Central R. Co.,* 349 U.S. 366, 372 (1955).

APPENDIX A

ORDER OF CALIFORNIA SUPREME COURT DENYING WRIT OF REVIEW

Petition for writ of review denied.

APPENDIX B

Decision No. 71795

BEFORE THE
PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA

Investigation on the Commission's own motion into the rates, rules, regulations, operations, contracts, practices, services, facilities, equipment, securities, finances, and financial transactions of Vallecito Water Company, Suburban Water Systems, Calfin, Victoria Mutual Water Company, and San Gabriel Valley Water Company, corporations; and into certain transactions between said corporations and Camille A. Garnier, C. H. Dietz, Walker Hannon, R. H. Nicholson, Frederick R. Schumacher, William J. Hickey, Toll & Co., Security First National Bank, a corporation, (Whittier Branch), and Bank of America National Trust and Savings Association, a corporation.	Case No. 8086 (Instituted December 15, 1964)

William Lassleben, Jr., for Vallecito Water Company; Guy and Smith, by *Arthur D. Guy, Jr.* and *Walker Hannon*, for Suburban Water Systems; Brobeck, Phleger & Harrison, by *Robert N. Lowry*, for San Gabriel Valley Water Company; Gray and Maddox, by *Frank E. Gray* and *William R. Pippin*, for Calfin Co.; *Howard M. Downs* for William J. Hickey; and *Howard A. Coke* for Security First National Bank and Gerald S. Toll; respondents.

Samuel D. Hale, Jr., for Frederick R. Schumacher, respondent and for Western Pacific Sanitation Company (Western Pacific Services), interested party.
Cyril M. Saroyan and *Raymond E. Heytens*, for the Commission staff.

INTERIM OPINION

The Commission, on December 15, 1964, instituted this investigation on its own motion into the rates, rules, regulations, operations, contracts, practices, services, facilities, equipment, securities, finances and financial transactions of Vallecito Water Company, a corporation, (Vallecito), Suburban Water Systems, a corporation, (Suburban), Calfin, a corporation, Victoria Mutual Water Company, a corporation, and San Gabriel Valley Water Company, a corporation, (San Gabriel), (Victoria Mutual Water Company was inadvertently named as a respondent and no inquiry was made into its operations), for, among other matters, the following purposes:

1. To determine all the facts and circumstances surrounding the purported sale or transfer of shares of stock of respondent Vallecito to any of the other respondents.

2. To determine what steps should be taken by any or all of the respondents to avoid or rescind any such sale or transfer, and to issue an appropriate order or orders to effectuate such purpose.

3. To determine what transactions have been entered into by any of the respondents, or any other person, purportedly in reliance upon any such sale or transfer, and the good faith of any of the respondents in entering into any such transaction.

4. To determine what steps should be taken by any of the respondents to avoid or rescind any such transaction, and to issue an appropriate order or orders to effectuate such purpose.

The Commission was particularly interested in the circumstances surrounding the acquisition of 18,003 shares of Vallecito Water Company (Vallecito) by William J. Hickey (Hickey) an individual, on or about November 4, 1964, the acquisition by Calfin Co. (Calfin), an alter ego of Suburban Water Systems (Suburban), through its agent, Toll & Co., a street name of Security First National Bank, between March 5, 1963, and the date on which Toll & Co. delivered said number of shares to Hickey, and the transfers by Vallecito on its stock records of said shares to Calfin and Toll & Co. during the same period having been found by Decision No. 67261, dated May 26, 1964, in Application No. 45688, to be in violation of Section 852 of the Public Utilities Code and, therefore, null and void and of no effect. Also by Decision No. 68217, dated November 10, 1964, in Application No. 46841, filed July 24, 1964, which denied Suburban's application to purchase Vallecito's common stock, it was ordered, pursuant to San Gabriel's Petition for Order Restraining Further

Transfer of Certain Shares and Share Certificate of Vallecito, (filed August 17, 1964), that neither Suburban, Calfin nor Vallecito sell or otherwise dispose of or transfer or cause to be transferred any of the stock held by any of them or any agent of their to any other or others than those from whom such shares were originally acquired and found by Decision No. 67261 to be unlawfully acquired. The Commission was also interested in the acquisition of Vallecito's stock by any other respondents.

Hearings

Public hearings were held before Examiner Warner on July 28 and 29, August 31, September 1, 1965, and before Commissioner Holoboff and Examiner Warner on January 6, 1966, and before Examiner Warner on January 7 and 18, February 8, 9, 17, 18 and 21, and March 14, 15 and 18, 1966, and before Commissioner Holoboff and Examiner Warner on July 7, 1966, and before Examiner Warner on August 17, 1966, in Los Angeles.

The matter of the investigation was submitted on the last-named date subject to the filing of briefs, which were filed on August 31, 1966.

Hearings on Orders to Show Cause why respondents Schumacher and Hickey should not be found to have been in contempt of the Commission by refusing to testify in response to a subpoena issued by the Commission in behalf of the Commission staff were held

before Commissioner Holoboff and Examiner Barnett re Schumacher, on March 28, 1966, in San Francisco,[1] and before Examiner Barnett re Hickey on June 1, 2 and 9, 1966, in San Francisco, and before Commissioner Holoboff and Examiner Barnett re Hickey on July 7, 1966, in Los Angeles.

The record comprises 65 exhibits and in excess of 2,000 pages of testimony, as well as matters incorporated by reference.

References

The following matters involving the parties herein have also been incorporated into this record by reference:

Application No. 34880, filed November 16, 1953, of San Gabriel for a certificate in the Puente area, and Application No. 34947, filed December 9, 1953, of San Jose Hills Water Company, (a predecessor of Suburban) for a certificate for the same area, granted to Suburban by Decision No. 49703, dated February 23, 1954.

Application No. 35093, filed January 25, 1954 of San Gabriel for a certificate, including the so-called Kwis Mutual area, granted by Decision No. 50251, dated July 6, 1954.

Application No. 36348, filed September 26, 1955, of Vallecito for a certificate to operate the water

[1]By Decision No. 71087, dated August 2, 1966, Schumacher was fined $500 for contempt and the Order to Show Cause re Hickey was dismissed by Decision No. 71064, of said date, he having finally testified.

system properties of Whittier Extension Mutual Water Company organized in 1914, for the setting of rates, and to issue 38,332 shares of $10 par value common stock for the properties, granted by Decision No. 53277, dated June 26, 1956.

Case No. 7422, filed August 16, 1962, of R. H. Nicholson vs. Vallecito Water Company, for an order to Vallecito to transfer to him his Vallecito stockholdings (11,122 shares) as the chairman of San Gabriel's Board of Directors and holder of 4,000 shares out of a total of 133,000 shares of San Gabriel's stock (R. H. Nicholson, trustee, owned the balance), dismissed by Decision No. 64305, dated September 25, 1962.

Application No. 45443, filed May 17, 1963, of San Gabriel to purchase Nicholson's Vallecito stock and all other Vallecito stock available, granted by Decision No. 66140, dated October 15, 1963.

Application No. 45688, filed August 13, 1963, of Vallecito to sell and Suburban to acquire Vallecito's water system assets, denied by Decision No. 67261.

Application No. 46658, filed May 22, 1964, of Vallecito to deviate from its Main Extension Rule 15 and thereby to exceed the 50 percent advance contract balance limitation of such rule, granted by Decision No. 68077, dated October 20, 1964, but Vallecito ordered to publish notice of its financial inability to further furnish water service pursuant to its Rule 15.

Application No. 46841, supra.

Application No. 46987, filed September 21, 1964, amended November 5, 1964, of San Gabriel to extend its service to industrial properties comprising 230 acres owned and to be leased by Union Pacific Railroad and 5 acres of Lawrence S. Gray and others adjacent to San Gabriel's certificated area but inside Vallecito's certificated area in the City of Industry, granted by Decision No. 69106, dated May 20, 1965.

Application No. 47094, filed November 4, 1964, amended January 22, 1965, of Vallecito to issue preferred stock, denied by Decision No. 69105, dated May 20, 1965.

Application No. 47052, filed October 20, 1964, Petition for Modification of Decision No. 68077, supra, filed November 4, 1964, Application No. 47111, filed November 12, 1964, and Application No. 47138, filed November 20, 1964, of Vallecito to exceed the 50 percent limitation of its Rule 15 to serve additional subdivisions, (including, among other areas, the 235 acres of Union Pacific and others' industrial site granted to San Gabriel by Decision No. 69106, supra,) denied by Decision No. 69381, dated July 7, 1965, and Application No. 47112, filed November 13, 1964, of San Gabriel to acquire Vallecito's preferred stock, dismissed.

Application No. 47790, filed August 3, 1965, amended September 1, 1965, of Vallecito to issue 50,000 shares of common stock on a pro rata basis to its existing shareholders, including Hickey and San

Gabriel and the remaining few others, and application No. 47809, filed August 13, 1965, of San Gabriel to acquire its pro rata share and any other of the proposed issue available, granted by Decision No. 70011, dated November 26, 1965, except that any stock sold to Hickey should be placed in an escrow, approved by the Commission, and not sold by Hickey without obtaining the written consent of the Commission. This decision was stayed by an Order dated December 14, 1965, and on February 15, 1966, Reopened for Further Hearings which were held before Examiner Warner on March 4 and 14, 1966, at Los Angeles, and then re-submitted for decision upon receipt of a late-filed exhibit on or before March 21, 1966. A motion to Dismiss Application No. 47790 was made orally at the latter hearing and filed on March 17, 1966.

Official Notice

Official notice is taken of San Francisco County Superior Court Action No. 558551, filed August 30, 1965, which is a suit by Hickey against Vallecito to quiet title to the stock held by him. Notice is also taken of Los Angeles County Superior Court Action No. 883196, filed April 18, 1966, a complaint by San Gabriel against Vallecito regarding the validity of the election of directors at Vallecito's annual shareholders meeting on April 5, 1966.

Motions

On September 1, 1965, Vallecito's counsel stated that he would move for a proposed report under Rule 69.

On April 20, 1966, counsel for the Commission staff filed a motion for an interim decision.

Background

Vallecito became a public utility water corporation and was authorized to acquire the water system of Whittier Extension Mutual Water Company in June, 1956, by Decision No. 53277, supra. Its service area comprises approximately 3,400 acres in and about the City of Industry, near La Puente, Los Angeles County; it furnishes water service to approximately 5,000 customers; and the potential of its area is some 10,000 domestic services. Suburban's certificated area abuts Vallecito on the east and San Gabriel's on the west.

In the summer of 1960, because of lack of finances, Vallecito determined it to be in the best interest of its stockholders to sell its assets. Negotiations for sale to San Gabriel were conducted but were tabled in November, 1960. None of the principal shareholders wanted to be in the water business and low earnings did not permit servicing a substantial long-term loan. An application for a rate increase was filed on July 6, 1961, which resulted in small relief in the irrigation rate, but no increase in general or other rates.

Exhibit No. 2 shows that in November, 1960, Suburban's and Calfin's President Garnier acquired 368 shares of Vallecito stock which were sold to Suburban on November 12, 1960, but were transferred back to Garnier by Suburban and reflected on Vallecito's stock transfer records on December 22, 1960; on December 31, 1960, said stock was transferred to Calfin. As of June 30, 1961, Calfin had recorded on its books an investment of $11,760 representing 980 shares of Vallecito stock including said 368 shares plus 612 shares acquired from others. Vallecito registered a total of 980 shares in the name of Calfin on March 5, 1963.

On July 12, 1963, 1,919 shares of Vallecito stock were transferred to Toll & Co. as nominee for Security First National Bank, together with 11,565 shares to be equitably held for Calfin. On August 5, 1963, Calfin's 980 shares of stock were transferred to Toll & Co. Between August 5, 1963 and January 17, 1964, 3,539 additional shares were transferred to Toll & Co. bringing its total holdings on behalf of Calfin to 18,003 shares; on November 4, 1964, said 18,003 shares were transferred to William J. Hickey.

Exhibit No. 10 shows that on March 14, 1961, Counsel Gray had advised Garnier that in his opinion the purchase by Calfin of any stock in another public utility would be in violation of Section 852 of the Public Utilities Code.

Exhibit No. 42 shows that, commencing in January, 1962, San Gabriel's Chairman of the Board, Nicholson, began to acquire Vallecito stock, using Santa Anita Turf Club stock valued at $500,000 as collateral for borrowings on his account from Bank of America. By March 5, 1962, which was the record date established for voting rights at Vallecito's annual meeting of April 3, 1962, he had acquired 2,396 shares, which had been transferred into his name. At said annual meeting Counsel Gray, on behalf of Suburban, protested Nicholson's right to vote his shares; the stock was permitted to be voted subject to consideration by election inspectors. On April 10, 1962, Nicholson was informed, by Vallecito's transfer agent, Bank of America, that the transfer of an additional 5,299 shares of Vallecito stock could not be effected since the bank had been informed by Counsel Lassleben not to effect such transfers pending determination of the applicability of Section 852. Then followed an investigation by Vallecito's counsel of Nicholson's acquisition and ownership of Vallecito's stock including an examination of Nicholson's bank accounts and those of San Gabriel; in the meantime, Nicholson filed Case No. 7422, supra, on August 16, 1962.

On November 2, 1962, Counsel Lassleben advised Vallecito's directors that he had found no violation of Section 852 and recommended the transferring of Vallecito's stock to Nicholson and the official recording thereof. His recommendation was adopted.

By May 17, 1963, Nicholson had acquired 11,118 shares of Vallecito stock which were sold to San Gabriel pursuant to the authorization granted by Decision No. 66140, supra.

On April 17, 1963, Utility Investment Company was formed by officers of San Gabriel, including Nicholson, who were aware of the Commission's knowledge in Suburban's rate proceeding, Application No. 43241, of Calfin's ownership of 980 shares of Vallecito stock, and were aware of no finding by the Commission that such holding was unlawful. Utility Investment Company, utilizing advances by San Gabriel, acquired 760 shares of Vallecito stock, which were later sold to San Gabriel ostensibly pursuant to authorization contained in Decision No. 66140, supra, dated October 15, 1963.

As of December 31, 1965, San Gabriel held 13,691 shares or 35.7 percent of Vallecito's outstanding common stock.

Early in 1963, Vallecito's directors had determined not to continue to operate but to sell, and the highest bid was Suburban's at $16.10 per share as a minimum price, and the next highest bid was San Gabriel's at $16.06 per share. On April 23, 1963, Skelton and Entwistle, directors of San Gabriel, were also directors of Vallecito. Between April, 1963, and August, 1963, two other directors of Vallecito were replaced by Dietz and Hannon, who were also directors of Suburban. On August 13, 1963, Application No. 45688, supra, the "assets"

case was filed, and as noted heretofore, said application was denied by Decision No. 67261, dated May 26, 1964. In addition to denying the application, having found that Suburban had failed to show that it was financially able to carry out the terms of the purchase and sale and having failed to show that the granting of the application would be in the best interest either of Vallecito's consumers and proprietors or Suburban's consumers, the Commission further found that the transfer of stock by Vallecito to Calfin, Suburban's alter ego, or Toll & Co. between July 12, 1963, and August 5, 1963, was in violation of Section 852 and null and void and of no effect.

Suburban and Calfin were ordered to report to the Commission in writing their action regarding their unlawful acquisition or their causing of the unlawful acquisition of Vallecito stock, and Vallecito was ordered to report in writing its action regarding its unlawful transfer of its stock to Calfin or to Security First National Bank, Whittier Branch, as holder. Said reports were ordered to be made within 10 days after the effective date of the decision.

In July, 1964 Suburban filed Application No. 46841, supra, for authority to acquire the 18,003 shares of Vallecito's stock equitably held by Calfin and registered in the name of Toll & Co.

Garnier was elected president of Vallecito in July, 1964. He was also president of Suburban, Southwest

Water Company, East Pasadena Water Company, Western Pacific Sanitation Company, (Western Pacific) a sewer service company, and other public utility water corporations and corporations at that time. He was also either secretary or president of Calfin. His election gave Suburban control of Vallecito's Board of Directors with Suburban's officers, Garnier, Dietz and Hannon, constituting the majority of three of Vallecito's five members.

On August 17, 1964, San Gabriel filed its Petition for Order Restraining Further Transfer of Certain Shares and Share Certificates of Vallecito Water Company.

On November 4, 1964, the shares held by Toll & Co. for Calfin were acquired by Hickey.

Suburban's Application No. 46841, supra, to acquire certain Vallecito stock was denied by Decision No. 68217, supra, dated November 10, 1964, and Suburban, Calfin and Vallecito were ordered not to sell or otherwise dispose of or transfer, or cause to be transferred any of the stock held by any of them or any agent of theirs to any other or others than those from whom such shares were originally acquired and found by Decision No. 67261 to be unlawfully acquired.

Circumstances of Hickey's Acquisition

Counsel Gray testified that on June 11, 1964, he and Dietz, on behalf of Calfin, met with three members of this Commission, individually, to ascertain what Calfin should or could do relative to the stock of Vallecito which which it then held. Based on his opinion and not on any specific directions by any of the Commissioners, he advised Calfin to divest itself of the stock.

Calfin's president, Garnier, who was in New York, testified that after a conference with Gerald S. Toll, vice president and trust officer of Security First National Bank, he "put out the word to get rid of the stock." (Tr. pp. 176 & 177 in Application No. 47094 previously incorporated herein.) Garnier further testified that he was not in California; he was in the East; and he knew nothing about the sale of shares of stock and he signed no documents in connection therewith. (Tr. p. 178 in Application No. 47094.) Garnier claimed that he did not tell the bank in writing to dispose of the shares and that he, as an officer of Calfin, did not communicate with the bank authorizing it to dispose of or transfer the shares to Hickey. (Tr. pp. 188 & 189 in Application No. 47094.) Calfin's secretary, Dietz, claimed that he had been on a fishing trip in New Mexico and had nothing whatever to do with the stock transfer transaction. (Tr. pp. 374 & 387 in Application No. 47094.) The testimony of these two witnesses is in direct conflict with Exhibits Nos. 3 and 6 in this investigation.

The record shows that Garnier's assistant, George H. McMillan, who was an employee of Calfin and treasurer and director of Western Pacific, arranged for a $300,000 loan to Western Pacific by Security First National Bank to finance the acquisition by an individual of the 18,003 shares of Vallecito stock held by Toll & Co. for Calfin.

On November 4, 1964, McMillan, pursuant to written authority, Exhibit No.3, from Dietz and Garnier of Calfin, authorized Calfin's counsel, Pippin, to accomplish the transfer of Stock Certificate No. 1024 to Hickey.

Earlier, on October 5, 1964, as shown in Exhibit No. 8, McMillan, acting for Vallecito, had obtained from Security First National Bank a consent to an amendment of Vallecito's Articles of Incorporation authorizing changes in capitalization to permit the issuance of a total of 100,000 shares of common stock.

Exhibit No. 57 is a copy of a promissory note dated November 3, 1964, issued by Hickey to Schumacher and Hale in the amount of $289,848.30 together with an agreement pledging 18,003 shares of Vallecito stock. Annual 6-½ percent interest has been payable, but remains unpaid; Schumacher and Hale having granted extensions. Schumacher was Western Pacific's counsel, is Garnier's personal attorney, and acted as counsel for McMillan on the last day of hearing on this investigation. Schumacher declined to disclose his client in

the movement of the shares of stock and the $289,848.30, although Hickey testified that Schumacher, as a friend, had apprised him of the availability of said shares and their price and worth. McMillan testified that he picked up a cashier's check in the amount of $289,848.30 at the office of Schumacher and Hale in Beverly Hills and later deposited it to Calfin's account at United California Bank in Covina. Calfin then paid off its debt to Security First National Bank, which had been incurred to finance Calfin's purchase of the 18,003 shares of Vallecito stock.

Loan No. 7-4663 in the amount of $300,000, Exhibit No. 58, is dated November 2, 1964, and Exhibit No. 12 is a copy of Security Bank's Report of Loan Made to Western Pacific, guaranteed by Camille A. Garnier. The original purpose of the loan is shown to "invest in public utility stocks" and source of repayment of loan is "$50,000 from bond money; balance from sale of Great Northern or sale of additional stock." The record is not clear about Great Northern's functions, and it may not now be operating. It had some connection with Western Pacific Sanitation Company, now Western Pacific Services whose offices are now in Las Vegas, Nevada. Western Pacific and its subsidiaries have sewer and water operations in Simi Valley, Ventura County, Northern California, Alaska, Colorado, and possibly elsewhere.

Vallecito's Operations

As of March, 1966, Vallecito had begun to replace its gas engine-driven pumps, with electric-driven pumps, had begun the installation of central telemetering equipment to control the operation of pumps, and had begun the replacement of worn-out concrete transmission mains. Such capital improvements were financed by a $275,000, 6.5 percent short-term loan from Salesmen Realty, Inc., purportedly of Denver, Colorado, whose existence, identity, location, and function are not clear except that it may be related to Great Northern Services or Western Pacific Services. Whether or not either principal or interest has been paid was not shown, except that, as of December 31, 1965, interest accrued amounted to $12,701.82. As of December 31, 1964, it was $2,663.04. By purchasing at discount certain construction advance contracts from subdividers, Vallecito's ratio of advances to net utility plant had been reduced to 44.7 percent as of December 31, 1965, and the utility was able to accept applications for extension of water service being demanded by subdividers within its certificated area.

A resolution by Vallecito's Board of Directors to apply for a general rate increase, adopted in April, 1963, as consideration for Suburban's willingness to purchase Vallecito's assets, has not been rescinded.

At a special meeting of Vallecito's Board on March 11, 1966, Counsel Downs was appointed a director upon Dietz's resignation; Tom G. Richards, General Man-

ager, was appointed treasurer; and Downs moved for the adoption of the resolution withdrawing Application No. 47790, supra.

As shown in its annual reports to the Commission, Vallecito's net operating revenues for the year 1961 were $16,212.31; for 1962, $13,949.17; for 1963, $35,-121.18; for 1964, $60,431.38; and for 1965, $47,218.31. Earned surplus was $20,583.49 at the end of 1961, and $119,824.89 at the end of 1965. Net utility plant had increased from $953,307.85 at the beginning of 1961 to $2,305,743.78 at the end of the year 1965.

Findings

The Commission finds as follows:

1. Vallecito's motion for a proposed report should be denied.

2. The motion for an interim decision filed by the Commission staff should be denied.

3. William J. Hickey holds 18,003 shares of Vallecito's total of 38,332 outstanding shares of common stock representing 47 percent and controls the election of directors, appointment of officers, and management of Vallecito.

4. Hickey acquired 18,003 shares of Vallecito stock from Toll & Co., nominee of Security First National Bank which equitably held said shares for Calfin Co., alter ego of Suburban Water Systems, a public utility

water corporation, which had borrowed approximately $279,000 from Security First National Bank to lend to Calfin to purchase said shares, and transfer them to Toll & Co. as holder and as security for Suburban's loan.

5. (a) Calfin, Suburban's alter ego, arranged with Security First National Bank for the latter to totally finance Hickey's stock purchase from Toll & Co. by a loan to Western Pacific Sanitation Company and a loan by Schumacher and Hale to Hickey in the amount of $289,848.30 (18,003 shares @ $16.10 per share).

(b) Hickey is an agent for the management and operation of Vallecito by Suburban.

(c) Hickey did not acquire said shares in good faith.

6. The 18,003 shares acquired by Hickey were unlawfully held by Calfin, and the issuance and transfer by Vallecito of its Stock Certificate No. 1024 to Hickey was null and void and of no effect.

Conclusion

The Commission concludes that Vallecito should be ordered to reverse its stock transfer records and cancel all transfers of stock to Calfin Co. and Toll & Co. and William J. Hickey.

Further findings with respect to the lawfulness of the acquisition by other respondents of shares of Vallecito stock, and further conclusions thereupon, will be the subject of a separate decision herein.

INTERIM ORDER

IT IS ORDERED that:

1. The motion of Vallecito for a proposed report is denied.

2. The motion of the Commission staff for an interim order is denied.

3. The transfers of 18,003 shares of its common stock by Vallecito Water Company to Calfin Co. and Toll & Co. were and are null and void and of no effect.

4. Vallecito shall, within 10 days after the effective date hereof, reverse its stock transfer records and cancel all transfers of stock to Calfin Co. and Toll & Co., and shall, within 5 days thereafter, report in writing to the Commission its compliance herewith.

5. The transfer of Stock Certificate No. 1024, for 18,003 shares of Vallecito's common stock by Vallecito Water Company to William J. Hickey was and is null and void and of no effect.

6. Vallecito shall, within 10 days after the effective date hereof, reverse its stock transfer records and cancel the transfer to William J. Hickey of Stock Certificate No. 1024, covering 18,003 shares of Vallecito's common stock.

The effective date of this order shall be twenty days after the date hereof.

Dated at San Francisco, California, this 30th day of DECEMBER, 1966.

PETER E. MITCHELL,
President

FREDERICK B. HOLOBOFF

A. W. GATOV
Commissioners

Commissioner George G. Grover did not participate in the disposition of this proceeding.

Commissioner William M. Bennett, being necessarily absent, did not participate in the disposition of this proceeding.

APPENDIX C

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the rates, rules, regulations, operations, contracts, practices, services, facilities, equipment, securities, finances, and financial transactions of Vallecito Water Company, Suburban Water Systems, Calfin, Victoria Mutual Water Company, and San Gabriel Valley Water Company, corporations; and into certain transactions between said corporations and Camille A. Garnier, C. H. Dietz, Walker Hannon, R. H. Nicholson, Frederick R. Schumacher, William J. Hickey, Toll & Co., Security First National Bank, a corporation, (Whittier Branch), and Bank of America National Trust and Savings Association, a corporation.	Case No. 8086

[Filed Dec. 15, 1964, Public Utilities Commission, San Francisco office].

ORDER INSTITUTING INVESTIGATION

Good cause appearing, IT IS ORDERED that an investigation on the Commission's own motion be and the same is hereby instituted into the rates, rules, regulations, operations, contracts, practices, services, facilities, equipment, securities, finances, and financial

transactions of Vallecito Water Company, a corporation, (hereinafter Vallecito), Suburban Water Systems, a corporation, (hereinafter Suburban), Calfin, a corporation, Victoria Mutual Water Company, a corporation, (hereinafter Victoria), San Gabriel Valley Water Company, a corporation, (hereinafter San Gabriel), all of whom are hereby designated respondents herein, and into certain transactions between said corporations and with the following named persons, all of whom are also hereby designated respondents herein, to wit, Camille A. Garnier, C. H. Dietz, Walker Hannon, R. H. Nicholson, Frederick R. Schumacher, William J. Hickey, Toll & Co., Security First National Bank, a corporation, (Whittier Branch), and Bank of America National Trust and Savings Association, a corporation, for the following purposes:

1. To determine whether any or all of the rates, rules, regulations, operations, contracts, practices, services, facilities and equipment of Vallecito, Suburban, Victoria, San Gabriel, or any of them, are reasonable, adequate or lawful, and to establish or prescribe reasonable rates, rules, regulations, operations, contracts, practices, services, facilities and equipment.

2. To determine all the facts and circumstances surrounding the purported sale or transfer of shares of stock of respondent Vallecito to any of the other respondents.

3. To determine what steps should be taken by any or all of the respondents to avoid or rescind any such sale or transfer, and to issue an appropriate order or orders to effectuate such purpose.

4. To determine what transactions have been entered into by any of the respondents, or any other person, purportedly in reliance upon any such sale or transfer, and the good faith of any of the respondents in entering into any such transaction.

5. To determine what steps should be taken by any of the respondents to avoid or rescind any such transaction, and to issue an appropriate order or orders to effectuate such purpose.

IT IS FURTHER ORDERED that respondents Suburban and Calfin file a report in writing under oath with the Commission within twenty days after the date of this order containing the names and addresses of all persons or corporations from whom they purchased or caused to be purchased for their benefit any shares of stock of Vallecito, all persons or corporations who may have lent money or extended credit to Suburban or Calfin in reliance upon the apparent ownership, legal or equitable, of such stock by Suburban or Calfin, and all persons or corporations to whom Suburban or Calfin may have offered, sold, contracted to sell, transferred or pledged any such stock.

IT IS FURTHER ORDERED that public hearings in this proceeding be held before such Commissioner or Examiner and at such time and place as may hereafter be designated.

The Secretary is directed to cause a certified copy of this order to be personally served upon each of the respondents above named.

Dated at San Francisco, California, this 15th day of DECEMBER, 1964.

FREDERICK HOLOBOFF
President

PETER E. MITCHELL
EVERETT C. McKEAGE
GEORGE G. GROVER
Commissioners

Certified as a True Copy
s/E. H. Gielocy
Assistant Secretary
Public Utilities Commission
State of California

BEFORE THE
PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA

Investigation on the Commission's own motion into the rates, rules, regulations, operations, contracts, practices, services, facilities, equipment, securities, finances, and financial transactions of Vallecito Water Company, Suburban Water Systems, Calfin, Victoria Mutual Water Company, and San Gabriel Valley Water Company, corporations; and into certain transactions between said corporations and Camille A. Garnier, C. H. Dietz, Walker Hannon, R. H. Nicholson, Frederick R. Schumacher, William J. Hickey, Toll & Co., Security First National Bank, a corporation, (Whittier Branch), and Bank of America National Trust and Savings Association, a corporation.	Case No. 8086

BENNETT, William M., Commissioner, Dissenting Opinion:

I dissent for the reasons set forth in my dissenting opinion to Decision No. 68217 dated November 13th, 1964.

Dated at San Francisco, California, this 17th day of December, 1964.

/s/WILLIAM M. BENNETT
WILLIAM M. BENNETT
Commissioner

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1161

VALLECITO WATER COMPANY,
Petitioner,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Respondent.

Brief in Opposition

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Brief in Opposition

OPINIONS BELOW

The Memorandum Order of the California Supreme Court denying a Petition for a Writ of Review is set out in Appendix A to the instant petition, and the Interim Opinion of the Public Utilities Commission of the State of California (hereinafter called Commission) is set out in said petition as Appendix B thereof.

JURISDICTION

The petitioner (hereinafter called Vallecito) invokes the Court's jurisdiction under 28 USC § 1257(3), and states (p. 2) "The federal question sought to be presented here was raised at the first available instance before the Public

Utilities Commission Petition for Rehearing, at p. 2, ..." *This statement is false.* The petition for rehearing addressed to the Commission was attached to and intended as a part of the petition for a writ of review addressed to the Supreme Court of California.[1] A perusal of the petition for rehearing addressed to the Commission shows that *it contains not the slightest intimation of any violation* of any provision of any constitution, state or federal.

The California Public Utilities Code sets out the California law governing review of decisions of the Commission. Section 1731 of said code is in material part as follows:

> "After any order or decision has been made by the commission, any party to the action or proceeding, or any stockholder or bondholder or other party pecuniarily interested in the public utility affected, may apply for a rehearing in respect to any matters determined in the action or proceeding and specified in the application for rehearing. The commission may grant and hold a rehearing on those matters, if in its judgment sufficient reason is made to appear. No cause of action arising out of any order or decision of the commission shall accrue in any court to any corporation or person unless the corporation or person has filed application to the commission for a rehearing before the effective date of the order or decision . . . ."

§ 1732 of said code is as follows:

> "The application for a rehearing shall set forth specifically the ground or grounds on which the applicant considers the decision or order to be unlawful. *No corporation or person shall in any court urge or*

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1. The Commission is not advised that either of these documents has been filed with this Court as a part of the transcript of the proceedings in the Court below as required by this Court's Rule 21(1). The Commission, therefore, pursuant to Rule 21(6), will file with its brief in opposition certified copies of these documents unless previously advised that they have been filed by the petitioner.

rely on any ground not so set forth in the application." (Emphasis added throughout)

§ 1756 of said code is in material part as follows:

"Within 30 days after the application for a rehearing is denied, or, if the application is granted, then within 30 days after the decision on rehearing, the applicant may apply to the Supreme Court of this State for a writ of certiorari or review for the purpose of having the lawfulness of the original order or decision or of the order or decision on rehearing inquired into and determined. . . ."

By failing to allege, in its petition for rehearing addressed to the Commission, any violation of any provision of the Constitution of the United States, Vallecito lost its right (if it had any), under California law, to claim any such violation before any court. This Court has held that required state procedures must be followed in raising a federal question. *In Re Lamkin,* (1957) 355 U.S. 59; *Ferguson v. Georgia,* (1961) 365 U.S. 570, 572. Stern & Gressman, "Supreme Court Practice" (3rd Ed.) p. 95. It has also held that when required by state practice, the federal question must be raised before the trial court, *Williams v. Georgia,* (1955) 349 U.S. 375, 382-383. For purposes of the instant petition the Commission was in a position analogous to that of a trial court, and was the tribunal that, under California law, must have been given an opportunity to consider any alleged violation of a provision of the Constitution of the United States as a condition precedent to review in any court.

It follows that no "title, right, privilege, or immunity [has been] specially set up or claimed under the Constitution . . . of . . . the United States", as required by 28 USC § 1257(3).

There is another and distinct reason that Vallecito has failed to specially set up or claim any title, right, privilege or immunity under the Constitution of the United States. Although as above demonstrated Vallecito had no right to allege (for the first time) in the California Supreme Court a violation of the Constitution of the United States, nevertheless, it attempted to do so, and it states on page 2 of the instant petition that it raised the federal question sought to be presented here "before the California Supreme Court (Petition for Writ of Review and Points and Authorities in Support Thereof, at pp. 25-29)".

An examination of pp. 25-29 of this document discloses that Vallecito did not anywhere specify what provision of the Constitution of the United States was alleged to have been violated. This Court has held that such failure precludes the granting of a writ of certiorari, *Bowe v. Scott,* (1914) 233 U.S. 658, 664-665; Stern & Gressman "Supreme Court Practice" (3rd Ed.) p. 92.

In view of what has been said, this Court's jurisdiction does not attach to the matter set out in the instant petition.

QUESTIONS PRESENTED

(1) Whether this Court has jurisdiction under 28 U.S.C. § 1257(3) to grant a petition for a writ of certiorari where the petitioner failed to set forth specifically in its application for rehearing addressed to a state regulatory agency, as a ground on which it considered the agency's decision to be unlawful, a violation of a provision of the Constitution of the United States, where applicable state law contains a prohibition that "No corporation or person shall in any court urge or rely on any ground not so set forth in the application."

(2) Whether this court has jurisdiction under 28 U.S.C. § 1257(3) to grant a petition for a writ of certiorari where, in its petition for a writ of review addressed to the Court below, the petitioner failed to specify what provision of the Constitution of the United States was alleged to have been violated.

(3) Whether a corporation has standing in this Court to seek redress of a wrong alleged to have been inflicted upon an alleged stockholder of that corporation who has himself not sought any such redress in any of the proceedings below.

(4) Whether a state regulatory agency has denied due process of law to one who was specifically designated by name as a respondent in an investigatory proceeding commenced by the agency on its own motion; to whom notice of hearing in such investigation was given by the agency; who in fact was present at said hearing and, after contesting the agency's jurisdiction over him, testified as a witness; who was thereafter erroneously and inexplicably told by the agency's hearing officer that he was not a respondent, and told by the agency's staff counsel that he had been subpoenaed to appear only as a witness, and that the staff did not intend that the agency exercise any jurisdiction over him; who subsequently appeared by his own counsel; where such counsel stated on the record that his client had decided, upon advice of counsel, not to participate in said proceeding; where thereafter he offered no evidence or argument, and examined no witness, but his counsel was present at nearly all subsequent hearings before the agency; where, after submission of the case, the agency, empowered by state law to regulate public utilities, ordered a public utility water company to reverse its stock transfer records and cancel a transfer of a controlling interest in its capital stock to him where applicable state law provides that "No public utility shall purchase or acquire, take or hold, any

part of the capital stock of any other public utility, organized or existing under or by virtue of the laws of this state, without having been first authorized to do so by the Commission. Every assignment, transfer . . . of any stock by or through any person or corporation to any corporation or otherwise in violation of any of the provisions of this article is void and of no effect, and no such transfer shall be made on the books of any public utility"; where the agency had not authorized such a transfer; where there was evidence adduced before the agency that he participated in a scheme intended to circumvent a prior decision of the agency denying to a second public utility authority to acquire control of the first, and further evidence and a finding by the agency that he did not acquire such stock in good faith.

(5) Whether the matter described in the petition is of sufficient gravity to warrant the granting of a writ of certiorari by this Court.

STATUTES INVOLVED

In addition to those statutes set out hereinabove in whole or in part on pages 2 and 3 under the heading "Jurisdiction", the statutes involved are those set out on pages 3, 4 of the petition.

STATEMENT OF THE CASE

The "Statement" of Vallecito is erroneous and misleading in numerous respects to be hereinafter described.

The controversy involved herein arose in 1962 out of the rivalry of two public utility water companies for control of a third, Vallecito. The Commission authorized one of these rivals to acquire all of Vallecito's capital stock. Before this authority was exercised the other rival, Suburban Water Systems, (hereinafter Suburban), caused its wholly owned subsidiary Calfin, found by the Commission to be

Suburban's *alter ego*, to purchase a controlling interest in Vallecito's stock, and sought for itself authority from the Commission to acquire all of Vallecito's assets. The Commission denied such authority to Suburban and contemporaneously found that the stock purchase by Calfin was tantamount to a purchase by Suburban, and that such purchase, not having been authorized by the Commission, was void under § 852 of the Public Utilities Code of California.

Thereafter, Suburban requested authority from the Commission to purchase the shares held by its *alter ego* Calfin. The Commission denied said request and enjoined any further transfer of said stock. But six days before the Commission's order was issued, the president of Suburban, who was the owner or controller of a large interest in its stock, one Camille Garnier, arranged, through his credit and numerous persons acting in concert with him, a further transfer of the stock held by Calfin to one William J. Hickey, an experienced lawyer and a friend of a friend of Garnier. The purpose of this transfer was to circumvent the Commission's prior decision denying authority to Suburban to acquire Vallecito's assets, and to anticipate and frustrate the Commission's decision denying to Suburban authority to purchase, and enjoining the further transfer of, the shares held by its subsidiary Calfin. The transfer of this controlling interest in Vallecito shares to Hickey's friendly hands enabled Garnier, as he intended, to continue his (and Suburban's) control of Vallecito. Garnier had already become president and a director of Vallecito, and with two other directors who were also directors of Suburban, constituted a majority of Vallecito's board of directors.

Virtually every detail of the elaborate scheme by which this transfer was accomplished, and by which Hickey acquired color of title to the shares in question, was laid bare before the Commission in the investigatory proceeding it commenced for the purpose, among other things, of inquir-

ing into the transfer of those shares to Hickey. It does not appear necessary or desirable to set out here a complete description of that scheme and how it was carried out. Such a comprehensive narrative, however, was set out by the Commission before the California Supreme Court, with complete documentation by references to the record adduced before the Commission.

It seems sufficient here to say merely that there was abundant evidence before the Commission that *Hickey invested not one cent* in the shares in question; that the purported purchase by him was colorable only and was made possible by money borrowed from a bank on Garnier's credit; and that either Hickey was actually privy to Garnier's scheme or, as a lawyer, he had ample grounds for suspecting the bad faith of the parties who arranged the numerous and devious transactions involved in the transfer.

Upon this and additional substantial evidence the Commission found that Hickey was not a bona fide purchaser.

A copy of the Commission's order instituting investigation into this transfer is Appendix C to the instant petition. It appears from this order, as acknowledged in the petition (p. 7), that Hickey was specifically named as a party respondent therein. Despite this basic fact the petition states (pp. 7, 8) that "the Commission chose not to adhere to the initial decision to designate Mr. Hickey and the others as parties respondent." In support of this wholly erroneous statement Vallecito refers to certain statements not by the Commission, but by its hearing examiner and staff counsel, that Hickey was not a party to the proceeding. It is true that the transcript of the record before the Commission reflects some misunderstanding as between counsel and the Commission's hearing examiner as to whether Hickey was a party before the Commission, or merely a witness, and as to the extent of the Commission's jurisdiction over him.

And the Commission's hearing examiner plainly and inexplicably erred in stating that "The Commission did not make [Hickey] a respondent." This misunderstanding apparently arose out of the fact that counsel for the Commission staff in preparing for hearing did not assume that Hickey would be present merely because he had been named a respondent, but caused to be issued and served upon him a subpoena duces tecum requiring his attendance as a witness. In any event, whatever misunderstanding arose did not injure Hickey. Neither staff counsel nor the Commission's hearing examiner ever said, either in so many words or in substance, as stated on page 8 of the instant petition, that "The caption on the order instituting investigation designating him as [respondent] was in error and should be disregarded".

It is obvious that the Commission designated Hickey a respondent in order to afford him an opportunity to be heard. The Commission never withdrew or in any way modified that designation.

Hickey was given notice of the hearing before the Commission and Vallecito admits that he appeared before the Commission [footnote p. 7], but states that his appearance was "in compliance with the Commission's subpoena". This statement is highly misleading. The transcript of the record before the Commission shows that when he first appeared before the Commission Hickey, after identifying himself, said "I am here in two capacities, one as a witness * * * The second matter, I would like the record to show that I have been served as a respondent in this matter * * * I . . . feel that the Commission has no jurisdiction to name me in this action as a respondent and, therefore, appear specially to contest the jurisdiction in that regard. As a witness, I intend to cooperate with the Commission to the best of my ability." (Tr. pp. 48, 49).

The transcript also shows that Hickey took the witness stand and testified up to a point with respect to the circumstances surrounding his acquisition of the Vallecito shares; that he was then asked whether it was "from your own personal funds that you purchased this block of shares?"; that he declined to answer on the grounds that "the source and condition of my private funds and resources I think are a matter that are strictly confidential to me and within my own private knowledge where they should stay."; that Hickey requested that he be excused until he could obtain counsel; that his request was granted; that when the hearing was resumed at a later date Hickey was not personally present but appeared by his attorney who stated on the record that he had advised Hickey that the Commission's investigation was illegal on various grounds, and that the subpena duces tecum was illegal and invalid, and that *Hickey had "decided not to appear before the Commission"* (Tr. pp. 239-264, 283, 289).

Contemporaneously with this decision Hickey brought an action in another forum, the Superior Court, a court of general jurisdiction, seeking a judgment quieting his title to the shares in question. After protracted litigation, that action was stayed by the Superior Court pending a final disposition of the Commission's investigation proceeding.

Hickey was later cited by the Commission for contempt for his refusal to complete his testimony before the Commission.

Another error appears in the petitions' Statement on page 4 where it is said of the Commission's order that it required Vallecito "to cancel 18,003 of its shares held by one William J. Hickey . . . ." The same error is repeated on pages 6, 11, 12 and 14 of the petition.

A reading of paragraph 6 of the Order (Petition Appendix p. 21) shows that the Order directed Vallecito to "re-

verse its stock transfer records and cancel the transfer to William J. Hickey. . . ." Obviously, Vallecito was ordered to cancel, not the stock, but the transfer of it.

ARGUMENT

A. The Court Has No Jurisdiction.

This conclusion has been demonstrated hereinabove on pages 1-4 under the heading "Jurisdiction".

B. The Petitioner Has No Standing.

With one qualification it can be said that the entire thrust of Vallecito's case is the charge that someone else, Hickey, has been denied due process of law.

The one qualification is the assertion, cautiously put and without conviction (p. 14), that "compliance by petitioner with [the Commission's] order *may* subject it to civil liability."

This qualification can be quickly dismissed with the observations that the Constitution of the United States offers no immunity from civil suits for damages; and that no question involving any such risk appears on page 2 of the petition as a "Question Presented."

In every other respect the petition is an argument on behalf of Hickey, and Vallecito strains mightily to find standing for itself to plead his cause.

The explanation for this extraordinary spectacle lies in the following: Hickey and his counsel deliberately decided to seek, in another forum, a judgment quieting Hickey's title before the Commission could reach a decision; and they apparently concluded that, as a part of this plan, Hickey should contest the Commission's jurisdiction, absent himself from its hearings, and refrain from seeking any relief from it, in order to avoid the appearance of having

submitted to the Commission's jurisdiction. This plan required, when the Commission's decision was rendered, that Hickey refrain from seeking rehearing. And that proved to be a mistake from Hickey's point of view because thereby, pursuant to Sections 1731 and 1732 of the California Public Utilities Code, he lost his right to seek review of the Commission's decision by the California Supreme Court, and by this Court. It is Garnier and not Hickey who has a large sum of money at stake; and Garnier controls Vallecito.

Now Vallecito says (petition p. 14) that it "probably" has "standing by necessity" to seek review here; that "as a technical matter, there may be no other means by which the rights of Mr. Hickey can be adjudicated. He was not a party to the proceedings before the Commission and apparently could not have sought review of the Commission's order in the California Supreme Court (or thereafter in this Court)."

In other places in the petition Vallecito repeats the assertion that Hickey was not a party to the proceedings before the Commission; that he "had no reason or opportunity to exercise the rights of a party to introduce evidence and examine witnesses"; that if he was at first a party the Commission did an "about-face", and "chose not to adhere to the initial decision to designate Mr. Hickey" a respondent; and that "no hearing of any kind was afforded Mr. Hickey" (pp. 8, 11, 13, 18). It is even suggested that the Commission was guilty of "luring" Hickey into a waiver of his Constitutional right (p. 19).

The error of these statements has already been demonstrated hereinabove on pp. 8-10. The truth is that the Commission made Hickey a party, whether he wished to be or not, and never thereafter changed his status. Vallecito pretends that Hickey was beguiled by members of the

Commission staff into giving up his opportunity to be heard. The truth is that he deliberately and knowingly, and on advice of counsel, deprived himself of such opportunity. Naturally, the Commission made no effort to force Hickey to put on a case, although it did insist upon his testifying as a witness called by its staff counsel.

Even if it should be assumed, *arguendo,* that Hickey was not a party to the Commission's proceeding, or that he was once made a party but his status was changed by the Commission, nevertheless, there was another way in which he could have argued he was eligible to seek review of the Commission's decision. He has always maintained he is a stockholder in Vallecito, and under Section 1731 of the Public Utilities Code of California (above set out on p. 2), he could have urged that he had a right as such to apply to the Commission for rehearing of its decision, and thereby to qualify for review by the California Supreme Court, and by this Court.

The petition is seriously in error therefore in stating (p. 14) that Hickey "could not have sought review of the Commission's order in the California Supreme Court."

There is, therefore, no basis whatever for Vallecito's claim of standing to seek redress in this Court on behalf of one who deliberately disqualified himself. The case of *Barrows v. Jackson,* 346 U.S. 249, cited in the petition (p. 15) does not support any such claim. On the contrary the Court (at pp. 255-257) there referred to its rule that "ordinarily precludes a person from challenging the constitutionality of state action by invoking the rights of others"; and continued: "... a person cannot challenge the constitutionality of a statute unless he shows that he himself is injured by its operation * * * This is a salutary rule, the validity of which we reaffirm."

C. The Commission Did Not Deny Hickey Due Process of Law.

It is clear from the Statement of the Case above set out on pages 8-10 that the Commission gave Hickey notice of its hearing and an opportunity to be heard, and that he did not choose to avail himself of it. There was no denial of due process under such circumstances.

In order to persuade the Court to grant certiorari Vallecito, on pp. 15-18 of the petition, has conjured up a conflict in cases having no relevance to the petition, cases involving the question of the need to give notice and an opportunity to be heard where none had been given. They are wide of the mark in the instant case where such notice and opportunity were given.

It seems unlikely that the Court will wish to heed, in the instant proceeding, Vallecito's adjurations that the alleged conflict in those cases be resolved.

D. The Alleged Wrong Described in the Petition Is Not of Such a Nature as to Warrant the Granting of Certiorari.

Even if one could assume, *arguendo,* that this Court has jurisdiction, that Vallecito has standing to plead another's cause, and that a Constitutional right has been violated, the matter is not of sufficient gravity to warrant this Court's review. It involves only a property right of a single person (whether that person be considered as Hickey or Garnier); the challenged decision turned on a unique set of circumstances and will affect no one else; no question of broad national or public import is presented; and there is no conflict in any relevant court decisions. The California Supreme Court did not even deem it necessary to require the Commission to certify and bring up the record of its proceeding, and denied the petition for a writ of review without opinion.

But the assumptions referred to are not reasonable; and the conclusion is inescapable that Hickey was not by the Commission denied an opportunity to be heard, but was a victim of his own (or Garnier's) decision not to participate in the Commission's proceeding.

CONCLUSION

Since this Court has no jurisdiction in the premises for the reason that Vallecito failed to qualify, under state law, for review by this Court, and failed to specify, for the California Supreme Court, the particular provision of the Constitution of the United States alleged to have been violated; and because Vallecito has no standing; and because Hickey was not denied an opportunity to be heard before the Commission, it is requested that the petition be denied.

Respectfully submitted,

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Dated: March 4, 1968.

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FILED
MAR 15 1968
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IN THE

Supreme Court of the United States

October Term, 1967

NO. 1161

VALLECITO WATER COMPANY,

Petitioner,

vs.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA,

Respondent.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Extraordinary misstatements of fact and law in the Commission's Brief in Opposition compel the presentation of this Reply Brief. We discuss, in turn, the Commission's assertion that this Court lacks jurisdiction to review the judgment of the California Supreme Court; its formulation of the questions presented by this petition; and, finally, its statements of fact and arguments respecting the constitutional claim presented by our petition.

JURISDICTION

The Commission contends that the federal question presented here was not properly raised below. This is not the case.

The federal question presented here was first raised during the hearings before the Commission. It will be recalled that the initial Order Instituting Investigation (reprinted in our Petition as Appendix C) had named Mr. Hickey as a party respondent. When Hickey, through his counsel, made a special appearance before the Commission to contest its jurisdiction, it was clearly stated that since the Commission was not asserting any personal jurisdiction over Hickey, any order affecting Hickey's stock ownership would be a denial of his rights under the due process clause of the United States Constitution:

> "MR. DOWNS: There are three additional reasons for the illegality of this investigation.
>
> "The investigation denies due process of law, both within the California Constitution and within the Federal Constitution."

[Mr. Downs then discussed two constitutional objections not presented here.]

> "The [third] reason for the illegality of this proceeding is the fact that Mr. Hickey is not even required to be a respondent in this proceeding.
>
> "The official position stated on the record this morning by both the Examiner and by counsel for the Commission is that admittedly Mr. Hickey is a nonutility and admittedly they are not asserting jurisdiction over him.
>
> "Yet, it is obvious from the Order Instituting

Investigation as well as from the statements of Mr. Saroyan, and I refer, for example, to page 21 of the transcript where he states that although prior to this time there has been no order that Vallecito would revise its stock records, he states this proceeding may be the proper vehicle to accomplish that result.

"So here is a man, the record showing he has paid approximately $300,000 for stock, the Commission is definitely seeking to affect his rights in that stock, and he is named just as a witness purportedly, not even as a party or a respondent with an opportunity to cross-examine or participate.

"He is confronted with orders previously decided in proceedings to which he was not a party with no opportunity to cross-examine or participate.

"In short, this very proceeding going forward without even attempting to name him as a respondent is a basic denial of due process." (R.T. Vol. 3, pp. 27[illegible] 202-203, Hearing of August 31, 1965.)

Thereafter, the federal question was squarely presented to the California Supreme Court in a petition for a writ of review of the Commissioner's order. That petition alleged that the Commission had "blatantly acted in violation of the due process provisions of the United States and California Constitutions" (Petition for Writ of Review, at p. 25)[1] and cited

[1]The Commission asserts that petitioner "did not anywhere specify what provision of the Constitution of the United States was alleged to have been violated." (Brief in Opposition, at p. 4). The point is both desperate and frivolous. Petitioner alleged a violation of the due process clause of the United States Constitution; there is only one such provision applicable to the states, and the California Supreme Court is well acquainted with it. The Commission cites Bowe v. Scott, 233 U.S. 658, 664-665 (1914), but that case involved a failure to allege a violation of the federal constitution. In the absence of such allegation, the Court assumed that the reference to the due process requirements was a citation to the state constitution. Here petitioner clearly alleged a violation of both the federal and state constitutions as respects the due process provisions.

decisions of this Court dealing with the due process requirement of a hearing. *Id.*, at pp. 25-29. The Commission's present contention that the issue was not properly before the California Supreme Court is all the more remarkable in view of its vigorous arguments in the California Supreme Court directed to the merits of that federal constitutional question and its failure even remotely to suggest to that court that the due process question was not before it. We respectfully submit that the question of due process *was* before the California Supreme Court; that both petitioner and the Commission vigorously argued it; and that this important federal question is now properly before this Court for review.

QUESTIONS PRESENTED

While we think it unseemly to burden this Reply Brief with an extended argument over the correct formulation of the Questions Presented by our petition, we do not wish to be thought to acquiesce in the Commission's version of those issues. We simply note our disagreement with the Commission's argumentative efforts—particularly with respect to their Question (4), which suffers the twin vices of inaccuracy and incoherence. We will reply in the discussion which follows to those specific allegations of fact contained in the Commission's questions which are inaccurate.

ARGUMENT

The Commission's version of the facts is in numerous respects inaccurate. We will attempt to respond to these

misstatements as we treat the substantive points made by the Commission in its Brief in Opposition.

1. The Commission asserts that, despite the repeated statements of its counsel and its Hearing Examiner that Mr. Hickey was not a party, the caption was in error and should be disregarded,[2] and that he was before the Commission solely as a witness, Mr. Hickey was somehow a party to the proceedings below. Our response to this is as follows:

(a) Our petition recites in detail the statements made by the Commission's counsel and by its Hearing Examiner (Petition, at pp. 8-9) disclaiming jurisdiction over Mr. Hickey. We need not repeat them here. The Commission admits (as it must in view of those quoted statements unambiguously reported in the transcript of proceedings) that these disclaimers took place. Nor does it point to any statements in the record contradicting these statements made by its counsel and by its Hearing Examiner. Instead, the Commission baldly urges that it is not bound by these disclaimers "plainly and inexplicably" (Brief in Opposition, at p. 9) made by its counsel and Hearing Examiner. We fail to understand

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[2] The Commission is in error when it states that "Neither staff counsel nor the Commission's hearing examiner ever said, either in so many words, or in substance, as stated on page 8 of the instant petition, that 'The caption on the order instituting investigation designating him as [respondent] was in error and should be disregarded.'" (Brief in Opposition, at p. 9.) We call the Court's attention to the following statement of the Commission's counsel at the hearing (cited previously in our Petition, at p. 8):

> "It is true that Mr. Schumacher's name is in this Order Instituting Investigation as a respondent . . . along with other . . . nonutility people, two banks and Mr. Hickey. . . .
>
> "Now, as I say, the Order . . . is very broad but I will lay this matter to rest right here and now that the staff does not intend to assert any jurisdiction or attempt for the Commission to exert any jurisdiction over Mr. Schumacher.
>
> "MR. DOWNS [Counsel for Hickey]: Mr. Saroyan, as I understand it, your statements as to Mr. Schumacher are also applicable to Mr. Hickey?
>
> "MR. SAROYAN: Yes, and it has been said two or three times at the last two days of hearings, a month ago, Mr. Downs."

how it can be other than bound; having delegated the function of holding hearings to a Hearing Examiner, the Commission cannot disclaim responsibility for his acts. And the Commission must be equally bound by the statements of its counsel who was charged with prosecuting the Commission's investigation in this case.

(b) The Commission also implies that, despite these disclaimers of jurisdiction, Mr. Hickey somehow waived his status as a non-party. It states that Mr. Hickey "appeared by his own counsel." (Brief in Opposition, at p. 5.) This was not, as the Commission implies, a general appearance, as Hickey's counsel emphasized at the outset that he was appearing specially to contest any exercise by the Commission of jurisdiction over Mr. Hickey. (R.T., Vol. 3, p. 271, Hearing of August 31, 1965.) The Commission also refers to statements of Hickey's counsel to the effect that he had "decided not to appear before the Commission." (Brief in Opposition, at p. 10.) These statements were made in reference to the decision made by Mr. Hickey on advice of counsel not to testify as a witness before the Commission. Whether he was legally correct in so doing is utterly irrelevant to the issue presented here: whether he was a *party* to the Commission's proceedings.

(c) The Commission asserts that it did not affirmatively prohibit Hickey from intervening in the proceedings. But it is wholly irrelevant that, had Hickey sought to participate as a party to the proceedings, the Commission might have permitted him to do so. The burden was on the Commission to make him a party if it chose to affect his stock rights by its orders; it was not Hickey's responsibility to volunteer or to in some way intervene. *Whitehouse v. Illinois Central R. Co.*, 349 U.S. 366, 372 (1955). As we noted in our petition (*Id.*,

at p. 19 and footnote), Hickey's position was that the Commission could not, as a matter of California law, exercise jurisdiction over nonutility individuals, and that the appropriate forum for resolution of the question of stock ownership was in a proceeding already under way in the Superior Court—a proceeding to which the Commission was invited, to participate.

2. The Commission's recital of its version of facts respecting Hickey's alleged participation in a scheme to frustrate the laws of the State of California and the Orders of the Commission is again irrelevant to the present proceeding and, for this reason only, we do not choose to reply. We do not accept these statements, but what is more important, the Commission's "findings of fact" on which they are based cannot be binding on Mr. Hickey, who was not a party to the proceedings in which they were made. We agree that these questions must be determined if the stock ownership question is ever to be resolved; but, once again, we submit that they can only be resolved in a full and fair proceeding in which all parties who may be affected may participate. That, plainly, in no way describes the proceedings which we now ask this Court to set aside.

3. We anticipated that the Commission would once again assert that petitioner lacks "standing" to protest the Commission's order directing it to cancel the stock now held by Mr. Hickey.[3] If, indeed, the question is one of standing,

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[3]We do not understand the Commission's statement that its Order directs petitioner "to cancel, not the stock, but the transfer of it." (Brief in Opposition, at p. 11.) Although that is an accurate description of the literal wording of its order, surely the same cannot be said of its effects. For if the transfer to Hickey is cancelled, so, too, will his stock as it is reflected on the books of the corporation. We doubt if the Commission would look with favor, should this Order be carried out, if thereafter we permitted Hickey to vote his stock after petitioner complied with the Order to cancel the "transfer" of that stock.

we submit that (for the reasons more fully stated in our Petition for Certiorari, at pp. 13-15) petitioner has standing because (1) it is indisputably affected by the Order; (2) compliance with the Order may subject petitioner to civil liability; and (3) as a practical matter[4], only petitioner can effectively raise the due process question we seek to present here, thus warranting the application of the doctrine of "standing by necessity" articulated by this Court in *Barrows v. Jackson*, 346 U.S. 249 (1963).[5] And as we suggested in our petition (at p. 15), the "standing" question may be in fact more accurately viewed as a question of whether the "indispensible party" requirements extend to administrative hearings. And that question requires resolution of several decisions of this Court in apparent conflict, a point with which the Commission does not come to grips.

CONCLUSION

The Commission has vigorously attempted to obscure the serious deficiency with its Order which is now before

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[4]The Commission suggests that under California law, Hickey could have filed a petition for rehearing with the Commission, and thereafter a petition for review in the California Supreme Court. (Brief in Opposition, at p. 13.) We doubt that this would be possible under California law, but need not pursue the question of local law here. For even if it were true, Hickey was not required to do so (see Whitehouse v. Illinois Central R. Co., 349 U.S. 366, 372 (1955)) and would have been foolish to intervene at that point. By then, the Commission had already made findings highly adverse to him; by petitioning for a rehearing, he might have been thought to intervene and thereby waive all right to claim thereafter that the Commission erred in making these findings and entering the Order cancelling his stock when he had not been a party.

[5]The Commission's discussion of and quotation from Barrows (Brief in Opposition, at p. 13) is again misleading. The Commission refers only to the Court's statement of the general rule regarding standing, which was stated as a prelude to its discussion of the principle of standing by necessity—an exception to that general principle on which we here rely.

this Court: it directs the cancellation of the stock, worth roughly $300,000.00, of a person not a party to its proceedings. The questions presented by that Order are substantial and, we respectfully submit, require this Court's attention. The Commission urges that the petition be denied because this case "involves only a property right of a single person." (*Id.*, at p. 14.) While we doubt that this unrestrained and cynical expression will find sympathy with this Court, we recognize the burden of the Court's case load. While we believe that the questions presented are more far reaching than the Commission implies, and urge that the petition be granted and the case set down for argument, it may not be amiss to suggest that this case presents an error so substantial and so egregious that it would be appropriate to grant this petition and reverse the judgment below *per curium*, directing that before any action to cancel Hickey's stock be taken, he be afforded the full and fair hearing on his claims that the United States Constitution requires.

Respectfully submitted,

HERBERT A. BERNHARD

Attorney for Petitioner

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
County of Los Angeles)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Los Angeles, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 215 West Fifth Street, Los Angeles, California 90013, that on March , 1968, I served the within PETITIONER'S REPLY BRIEF (Vallecito Water Company v. Public Utilities Commission of the State of California – No. 1161) on the following named parties by depositing a copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Los Angeles, California, addressed to said parties at the address as follows:

Mary Moran Pajalich, Chief Counsel
J. Thomason Phelps, Principal Counsel
Cyril M. Saroyan, Senior Counsel
State Building, Civic Center
San Francisco, California 94102
Attorneys for the Public Utilities
Commission of the State of California

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March , 1968, at Los Angeles, California.

Signature

Subscribed and sworn to before me
this day of March, 1968.

Notary Public in and for the State of California.

DEAN-STANDEFER COMPANY, 215 W. 5th St., L.A. 90013
MAdison 8-6898